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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 691 MISC.

UNITED STATES OF AMERICA, ex rel. JOHN H.
ROONEY,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,
Respondent.

UNITED STATES OF AMERICA, ex rel. HENRY P.
BERRY,

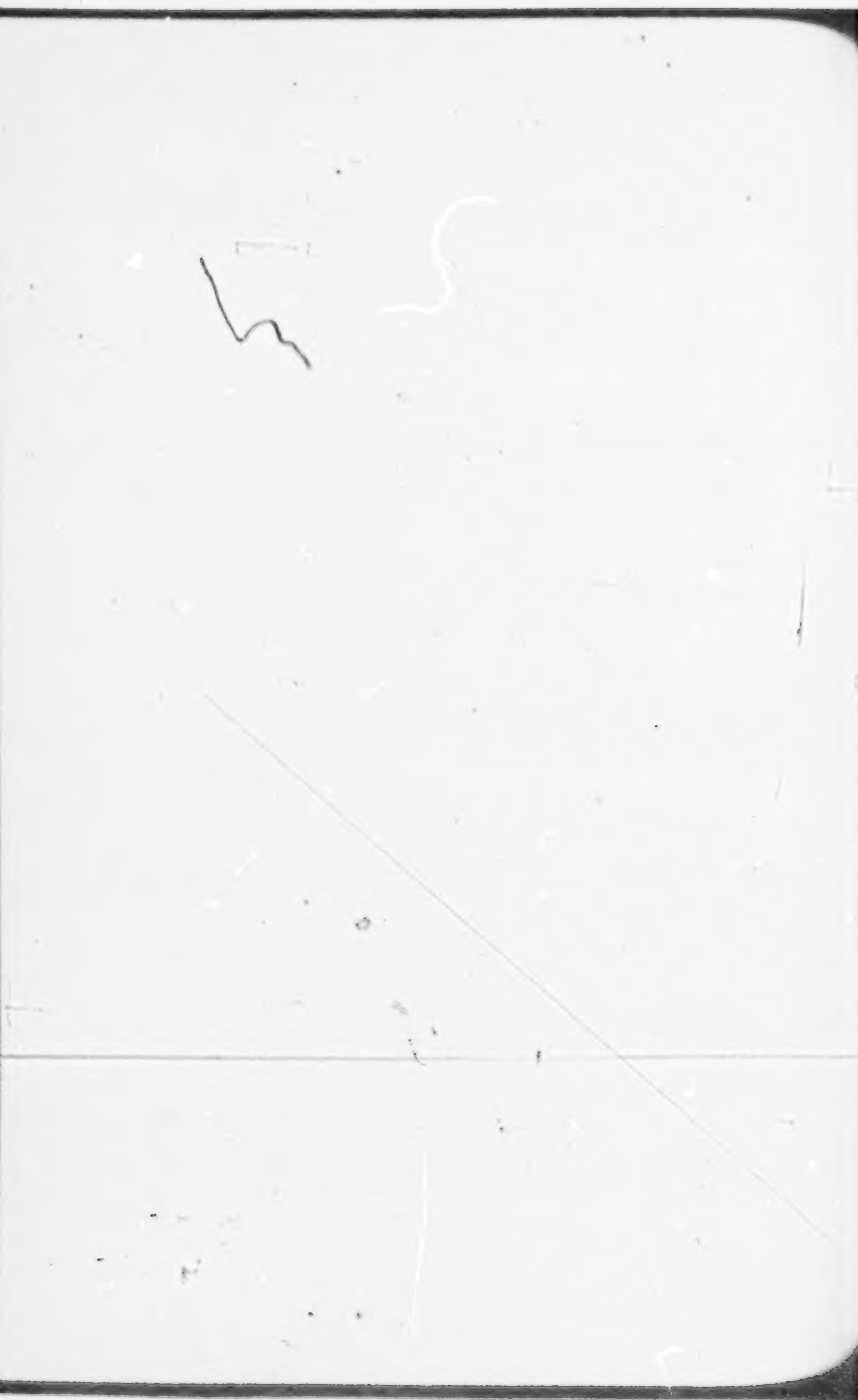
Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

X JOHN H. ROONEY
HENRY P. BERRY
Pro sese.



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**PETITION FOR WRIT OF CERTIORARI
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JOHN H. ROONEY and HENRY P. BERRY, Petitioners,
appearing *pro sese*,¹ pray that a writ of certiorari issue to

¹ This petition was prepared and printed by Albert E. Jenner, Jr., and Roger W. Barrett who served as appointed counsel for petitioners in the court below. They were assisted by Edward I. Rothschild. Petitioners are without funds to engage counsel to represent them or to pay the costs or other expenses of these proceedings.

review the judgments of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled causes² on March 22, 1949.

Record and Opinion Below.

The causes were heard together on the same transcript in both the District Court and the Court of Appeals. The District Court stated its views orally (R. 459-467),³ but filed no formal opinion. The opinion of the Court of Appeals is reported at 173 F. 2d 668. In prior proceedings the Court of Appeals sustained the legal sufficiency of the Rooney petition. *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346 (C. A. 7th 1946); *cert. denied*, 331 U. S. 842 (1947).

Jurisdiction.

The judgments of the United States Court of Appeals for the Seventh Circuit were entered on March 22, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Secs. 1254, 2101.

Summary Statement.

Petitioners were convicted of murder and sentenced to life imprisonment in 1933. After years spent exhausting state remedies, they filed petitions for habeas corpus in the Federal District Court, contending that the series of events before and during the trial denied them due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The District Court and Court of Appeals held that no Federal right was in-

² Causes numbered 9577 and 9578 in the court below.

³ Page references are to the transcript of the proceedings at the hearing in the District Court.

vaded by the repeated illegal searches and seizures and the repeated use of illegally seized evidence, but neither court squarely passed on the effect of these searches and seizures and the use of this evidence considered in connection with and as a part of the totality of police and prosecution misconduct which precluded the possibility of a fair trial.

The totality of facts showed, in addition to the repeated illegal searches and seizures, the illegal arrest of petitioner Rooney in Wisconsin beyond the jurisdiction of the Illinois arresting officers, and the forcible transportation of Rooney from Wisconsin to Illinois without even colorable compliance with the extradition or other laws of either state. Moreover it is admitted that the convictions could not have been obtained without the testimony of one Davidson, a disreputable, weak-willed alcoholic who was maintained in fine hotels in so-called "protective custody", entertained, and paid substantial sums of money by the State's Attorney, before, during, and after the trial, and faced with his prior criminal record—all in a successful effort to obtain favorable testimony, later recanted, from a man peculiarly susceptible to such improper influences. These and other facts which fit into the same unsavory pattern, taken as a whole, made impossible a fair trial of petitioners for the capital offense of which they were convicted.

Questions Presented.

1. Whether the Fourteenth Amendment to the Federal Constitution protects petitioners from conviction of a capital offense obtained by means of such police and prosecution excesses and disregard of law as illegal breaking and entering and searching of a union office, an apartment, a garage in Chicago, and a cottage in Wisconsin; illegal

seizure of evidence during these illegal searches; use of such illegally seized evidence before trial to "refresh the recollection" of witnesses; introduction of such illegally seized evidence at the trial in defiance of a pre-trial agreement that it was inadmissible and would not be employed; seizure of petitioner Rooney in the State of Wisconsin and his forcible return to Chicago by armed Illinois police officers acting under the direction of the Illinois State's Attorney and in violation of the sovereignty of the State of Wisconsin—no attempt being made prior to said illegal searches and seizures and said kidnapping to obtain search or arrest warrants, or to follow established extradition procedures, though in every instance the police had ample time to proceed according to law; bribery and coercion by the State's Attorney of his key witness without whose testimony it is conceded no conviction could have been obtained; keeping of this key witness in alleged "protective custody" and unavailable to the defense before trial; and the omission of his name from the list of witnesses on the indictment—whether these events so taint the whole course of proceedings as to vitiate the convictions in this capital case.

2. Whether the use by a State of illegally seized evidence to bring about convictions of a capital offense under the circumstances of this case vitiates the convictions as violative of the Fourteenth Amendment to the Federal Constitution.

CONSTITUTIONAL PROVISION INVOLVED.

"* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"
U. S. Const., Amendment XIV, Section 1.

STATEMENT

HISTORY OF THE LITIGATION

On May 23, 1933, at about 2:30 A. M., a night watchman sitting in a car parked in front of a Chicago department store was killed by shots fired from a speeding automobile. The store had been involved in a labor dispute with a handbill distributors' union of which Petitioner Rooney was president. Petitioners and one Rosalie Rizzo were indicted for the crime and upon trial before a jury in the Criminal Court of Cook County were convicted of this murder on August 5, 1933. Petitioners were sentenced to life imprisonment. Miss Rizzo was sentenced to imprisonment for 20 years. The convictions and sentences were affirmed by the Supreme Court of Illinois despite the fact the Court found the State's Attorney had acted improperly in introducing illegally seized evidence at the trial. *People v. Rooney*, 355 Ill. 613, 624 (1934). Upon expiration of her sentence, Miss Rizzo was discharged. Petitioners are still in prison.

Petitioners were represented by employed counsel in the Criminal Court of Cook County and in the Supreme Court of Illinois. Those proceedings exhausted their assets; they were without funds to employ counsel to prosecute review by certiorari in this Court. A rule then in effect at the Illinois state penitentiary, where petitioners had been incarcerated pending the proceedings in the Illinois Supreme Court, prevented them from seeking such review *pro sese*, or from seeking relief *pro sese* in any other court. See *White v. Ragen*, 324 U. S. 760, 762n.1 (1945); *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346 (C. A. 7th 1946). Petitioners were therefore unable to ask this Court to review the judgment of the Supreme Court of Illinois or to petition a Federal District Court to con-

sider their Federal constitutional contentions until in 1943 the warden was forced by a Federal court order to abrogate that rule.⁴ The rule had effectively deprived petitioners of their right to have this Court "make an independent determination of the undisputed facts." *Malinski v. New York*, 324 U. S. 401, 404 (1945). After the abrogation of the warden's rule, petitioners *pro sese* unsuccessfully traveled the Illinois procedural labyrinth seeking a hearing, *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346, 352 (C. A. 7th 1946).

On May 31, 1944, Rooney, *pro se*, filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois. The State urged that State remedies had not been exhausted, and the petition was dismissed on the State's motion. The order of dismissal was reversed by the Court of Appeals, which held that Rooney had exhausted his State remedies, and that he had alleged facts which entitled him to relief. *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346 (C. A. 7th 1946). This Court denied certiorari. 331 U. S. 842 (1947).

Berry's petition for habeas corpus was filed in the District Court on January 13, 1945. The two petitions were heard together in the District Court, and were dismissed on December 24, 1947, after a joint hearing on the merits.

The orders of the District Court were affirmed by the Court of Appeals for the Seventh Circuit on March 22, 1949. This petition for certiorari seeks review of that decision.

⁴ *United States ex rel. Foley v. Ragen*, 52 F. Supp. 265, 269 (N.D. Ill. 1943), *rev'd on other grounds*, 143 F. 2d 774, 777-778 (C. A. 7th 1944); *United States ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973 (N.D. Ill. 1944).

SEARCH AND SEIZURE AT ROONEY'S OFFICE.

During the week preceding the shooting on May 23, 1933, union headquarters, maintained by Rooney as president, had been under surveillance by the State's Attorney's office. (R. 45-46, 364) The day after the shooting, and again two days later, the headquarters were raided by State's Attorney's police. (R. 46, 59) On the second raid, the police searched the office, drilled open the safe, and seized its contents. (R. 46, 59-60) No search warrant or other process had been issued for the raid on union headquarters, and no warrant had been issued for the arrest of petitioner Rooney. The search of union headquarters was not incident to an arrest. (R. 46, 59-60) Although none of the evidence thus acquired was introduced at the trial, petitioners do not know to what extent the raid and illegal seizures were helpful to the prosecution in preparing its case and in obtaining evidence that was used at the trial. Rooney and Berry were absent during both raids. (R. 47)

SEARCH AND SEIZURE AT ROONEY'S CHICAGO APARTMENT.

Petitioner Rooney maintained in Chicago an apartment for the use of himself and Rosalie Rizzo. On the night of June 2-3, 1933, nine days after the shooting had taken place, this apartment was broken into by the State's Attorney's police. No one was in the apartment at the time. (R. 47-49, 376) The premises were searched and evidence taken therefrom. (R. 47-49, 51, 59, 375-376) A receipt for the purchase price of field glasses which was taken from a dresser drawer figured prominently in the trial. (R. 41-42, 58-59, 378-379) It was introduced in evidence to corroborate the testimony of the State's chief witness, and generally to lend credibility to his story. It is not known what use was made of other evidence thus obtained.

Police occupied this apartment for about two days. (R. 51)

No search warrant had been obtained for the action of the raiding officers on the night of June 2-3; neither Petitioner Rooney nor Miss Rizzo had been arrested; no warrant had been issued for their arrest; the search of the apartment was not incident to an arrest. (R. 59)

SEARCH AND SEIZURE AT THE HOME OF MISS RIZZO'S PARENTS.

After completing the search of the Rooney-Rizzo apartment, the State's Attorney's police repaired to the home of Miss Rizzo's parents in the pre-dawn hours of June 3rd. (R. 49) There they forced open the garage door and removed from the garage an automobile belonging to Miss Rizzo. (R. 49-50, 59) Again, no search warrant covered the action of the officers. Again, no arrest was made. Again, no arrest warrant had been issued for Miss Rizzo or petitioners. Miss Rizzo's parents were in no way connected with the crime. The State's Attorney used the automobile to re-enact the alleged crime in the presence of all witnesses on the scene the early, dark morning hours of May 23, 1933. This was done to "refresh" the recollection of the witnesses. (R. 56-58, 320-322)

The use of the illegally seized automobile by the State's Attorney to connect petitioners with the crime and to corroborate the testimony of the State's key witness is typical of the methods used by the prosecution to obtain convictions. When first questioned by the police, one McDowell, a watchman at the department store (R. 316), told the police that he had observed a car in the vicinity of the shooting, and that he thought it was a maroon (R. 319) Pontiac. (R. 321) He mentioned no other identifying marks on the car. The car taken from the garage at the home of Miss Rizzo's parents was a blue Plymouth,

with cream colored wire wheels and a white stripe around the tonneau. (R. 50) At the trial, McDowell testified that at a later closer examination he determined that the car he had seen was a blue (R. 320) Plymouth. (R. 322) The closer examination was made by McDowell during an alleged re-enactment of the crime by the State's Attorney in broad daylight, using the automobile illegally taken from the Rizzo garage. (R. 56-58)

WISCONSIN KIDNAPPING AND SEARCH AND SEIZURE

Early in June, 1933, the State's Attorney learned that Rooney and Rizzo were at a summer place in Eagle River, Wisconsin. He sent two detectives, Pribyl and Gray, from Chicago to Eagle River. They found that Rooney and Rizzo had been in Eagle River for several days, living in a small cottage near The Spider, a dining and dancing resort. Rooney and Rizzo had made no effort to conceal their whereabouts. The detectives first saw them driving down the main highway in Eagle River. They frequented The Spider. (R. 52-53)

Pribyl and Gray shadowed Rooney and Rizzo for two days. On June 12, 1933, Pribyl telephoned the State's Attorney in Chicago for instructions. (R. 52) He was told to await the arrival of more police. A rendezvous was arranged. Late in the night of June 12th, or very early in the morning of June 13th, Officer Pribyl made contact with two squads of police from the office of the State's Attorney in Chicago. (R. 52-53) These men were fully armed. The rendezvous was made about 40 miles from Eagle River. (R. 314)

The whole force of armed men proceeded to Eagle River and the cottage of Rooney and Rizzo. They entered the cottage in the hours before dawn on June 13, 1933. Petitioner Rooney and Miss Rizzo were awakened, routed out

of bed at gunpoint, forced to dress, and handcuffed. (R. 52-53) The Illinois officers searched the cottage and took from a dresser drawer field glasses which were introduced in evidence at the trial to corroborate the testimony of Davidson. (R. 53-54, 58, 378-379)

No warrant had been issued either in Illinois or in Wisconsin for the arrest of petitioner Rooney and Miss Rizzo at Eagle River, Wisconsin, and no search warrant had been issued by either State. The search and seizure were not incident to a lawful arrest. Only Illinois officers took part in the action. (R. 59)

KIDNAPPING OF ROONEY AND RIZZO IN WISCONSIN AND
THEIR TRANSPORTATION TO ILLINOIS.

Upon completion of their search of the cottage, the Illinois police, without the consent of petitioner Rooney or of Miss Rizzo, forced the handcuffed Rooney to ride in one car and the handcuffed Miss Rizzo to ride in another. In this manner they traveled the 350-odd miles back to the Illinois State Line. No attempt was made to comply with established extradition procedure. (R. 39, 53, 59, 314)

The action at Eagle River took place 21 days after the murder, 18 days after the search and seizure at Rooney's office, 11 days after the search and seizure at the Chicago apartment, 10 days after the search of the home of Miss Rizzo's parents and the seizure of Miss Rizzo's automobile, and at least 2 days after the presence of Petitioner Rooney and Miss Rizzo in Eagle River was known to the State's Attorney. Petitioner Rooney was apparently under suspicion as early as the day after the murder. (R. 46, 59) Yet no warrants of any kind had been obtained authorizing the actions of the various Illinois officers under the direction of the State's Attorney.

THE WITNESS DAVIDSON.

One Alex Davidson was the chief witness for the State. It has been conceded by the State throughout these proceedings that without his testimony, conviction of petitioners would have been impossible. He was a West Madison Street alcoholic who went to union headquarters the afternoon preceding the fatal evening to ask Rooney to accept him as a member of the union and to give him work as a handbill distributor. He was not employed, but remained at and lived in the union headquarters as bartender until he was picked up some eight days later by the State's Attorney's police. (173 F. 2d at 671, R. 201-202, 221-223) He testified that he helped himself to money from the union cash register. (R. 224)

Davidson was picked up by the State's Attorney's police on June 1, 1933. (R. 46, 221) He was questioned by two assistant State's Attorneys. (R. 46, 225-228, 275-278, 347-348, 365-367) Davidson told them that he was at union headquarters tending bar all night on May 23, 1933, and that neither Rooney nor Berry left the premises at any time; he was released. (R. 277-278, 348) On June 2, 1933, Davidson was again picked up by the State's Attorney (R. 46-47, 278-279) and was installed in quarters at the Palmer House Hotel as the guest of the State's Attorney. At the Palmer House the assistant State's Attorney "faced" him with his record, and otherwise questioned him. Davidson then changed his story and implicated petitioners. Thereafter, he was held continuously in the so-called "protective custody" of the State's Attorney and at the State's Attorney's expense in the Palmer House and the Clayton Hotels until some time after the end of the trial of petitioners, more than two months later. (R. 358)

Davidson, who had been in the House of Correction shortly before the murder purported to have had some difficulty remembering where he lived in the Spring of 1933. (R. 201-202, 205, 339) He did not live with his wife and family. (R. 205) He testified that during the week preceding the killing he was living at "some flop house on Madison Street." (R. 202)

During the period of his "protective custody," he was maintained in style by the State's Attorney at the Palmer House and Clayton, first class hotels in the City of Chicago. (R. 161-162, 167, 230-232, 235-240, 282, 352) Two police officers "protected" him at all times. (R. 235-236, 238-239, 352) Hotel bills were paid by the State's Attorney. (R. 246, 282, 340, 352) Davidson was allowed to order anything in the way of food and drink that either hotel had to offer, and was otherwise entertained in and out of the hotels, at the expense of the State's Attorney. (R. 237, 239, 246-249, 340, 352)

During the period of his "protective custody," Davidson was paid by the State's Attorney's office at the rate of \$20.00 per week. (R. 240-242) This was in addition to his maintenance at fine hotels and in addition to a certain amount of entertainment. Support money was paid Davidson's wife. (R. 242, 245-246, 352, 535) Davidson testified that he had no need for money for himself during the period of his "protective custody." (R. 250) Small personal "loans" were made to him before, during, and after the trial by the prosecutors themselves. (R. 213-221, 253-254, 352-354, 374, 381) The State's Attorney paid a month's rent on an apartment for Davidson after Davidson had testified. (R. 250-252)

The State's Attorney went even further. He obtained a job for Davidson on the payroll of the City of Chicago. His pay amounted to several thousand dollars. (Exhibits

1 and 8, common law record in Rooney case; R. 102-104, 258-259, 283, 351) There is also evidence that Davidson was further connected with the State's Attorney. On the trial in the District Court it was proved that he received a subpoena in another criminal case addressed "Officer Davidson, State's Attorney." This designation of Davidson was furnished by the State's Attorney to the court clerk who issued the subpoena. (R. 88-95, 99-101) As late as 1946, Davidson's relation to the office was such that he inquired of the State's Attorney whether the latter had a job for him. (R. 289) Respondent has conceded that it was largely through the testimony of Davidson that petitioners and Miss Rizzo were convicted. *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346, 348, 349 (C. A. 7th 1946).

In addition to the influence of Davidson's changed surroundings and the various considerations received from the State's Attorney, the specter of his criminal record and his possible implication in this very murder must have been constantly before Davidson while in "protective custody." (R. 234-235, 377) He had been arrested sixteen times, though he was only thirty years old at the time of the trial; he was continually in difficulty with law enforcement authorities. (R. 70, 74-82, 185, 188, 199-208) He lived from hand to mouth, sleeping wherever he was tolerated; he had no home. (R. 339) There is no evidence that he was threatened with prosecution for this murder, but the history of his conduct under pressure from the State's Attorney admits of that inference.

After the trial and the release of Davidson from "protective custody," and during those periods when he was not under pressure from the State's Attorney, he executed affidavits recanting the damaging portion of his testimony against petitioners. (Exhibits 1 and 9, common

law record in Rooney case) The first recantation of his trial testimony was made by Davidson in December, 1936, at a time when he was not in "protective custody" and not on the payroll of the City of Chicago. (R. 109-116, 132-139, 262-266, 269, 271, 275, 302-303) The second was made in 1941. (R. 29-32, 125-128, 136-139, 261-262) At this time payments from the City of Chicago had completely ceased.

Two counter-affidavits were obtained from Davidson by the State's Attorney. In 1943 or 1944, Davidson was picked up by the police and taken to the State's Attorney's office. There an Assistant State's Attorney confronted him with one of his affidavits of recantation and told him: "You are going to sign another affidavit." Davidson signed. (R. 291-292) Again on April 5, 1946, Davidson was brought in by the State's Attorney's police and induced to sign an affidavit supporting the testimony he had given at the trial of petitioners. (R. 283-285, 287-290)

The witness Davidson, upon whose testimony the convictions depended, lied so obviously at the habeas corpus trial that the District Court described him as "unquestionably a habitual liar." (R. 464, 466) The Court of Appeals, in its turn, found no reason to disagree with his characterization as a "drunken, irresponsible, untrustworthy, psychopathic, flophouse bum with a criminal record." (^{173 F.2d at 671} ~~Court of Appeals slip opinion, p. 6~~) Davidson's bad reputation for truth and veracity, as well as otherwise, was well known to the officers in charge of the prosecution of petitioners. They were nevertheless willing to apply to Davidson the pressures and influences noted above.

VIOLATION BY THE STATE'S ATTORNEY OF AGREEMENT
NOT TO USE EVIDENCE ILLEGALLY OBTAINED.

Before the trial petitioners made a motion to suppress the illegally seized evidence. The prosecution thereupon admitted—as indeed it had to—that the evidence had been illegally seized, and agreed not to introduce it. Subsequently, and in violation of this agreement, such evidence was offered by the prosecution. Over petitioners' objections the evidence was admitted. This conduct of the State's Attorney was condemned by the Supreme Court of Illinois. *People v. Rooney*, 355 Ill. 613, 623-624 (1934). See *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346, 348 (C. A. 7th 1946).

THEORIES OF THE LOWER COURTS.

Neither of the courts below squarely passed on petitioners' basic contention that the cumulative effect of the facts outlined above denied petitioners the due process required by the Fourteenth Amendment.

The District Court, recognizing that the case presented novel and far-reaching questions, conceived its function only as "taking the proceedings so that the facts may be presented to the reviewing court who may perhaps more appropriately develop the law applicable." (R. 460) After stating the facts substantially as outlined in this petition (R. 461-465) the District Court concluded:

"I don't know what the Supreme Court will say when they get this case. Maybe upon the whole case they will say, 'Well, the petitioner didn't have a fair trial and he ought to have another one.'

"But, I think it would be presumptuous for me to say that." (R. 465-466)

The Court of Appeals also found the facts to be as stated in this petition. On the question whether the ille-

gal searches and seizures alone violated the Fourteenth Amendment, the Court of Appeals repeated the view of the District Court that this is a case requiring the attention of a higher court:

"We think it would be presumptuous on our part to anticipate or speculate on what the Supreme Court will hold if and when it is presented with the instant question. It may be, as argued, that the Supreme Court is advancing steadily in the direction claimed, but it will be time enough for us to follow that court when such a decision is made. It is neither our purpose nor desire to accelerate or become the torch bearer for this ever-expanding interpretation of the due process clause." 173 F. 2d at 670.

The Court of Appeals held (1) that although the use of the illegally seized evidence would have vitiated a federal conviction, the Fourteenth Amendment does not prohibit the use of such evidence in a State trial, and (2) that petitioners had not proved a case of knowing use of perjured testimony. Unlike the District Court, the Court of Appeals did not pass on the aggregate effect of the series of elements of unfairness outlined above; nor did it purport to do so. It merely said that the District Court—which had stated that it did not "know what the Supreme Court will do"—concluded that the proof was not sufficient to prove a denial of due process. The Court of Appeals agreed with that conclusion.

The District Court conceived its function as limited merely to making a record for the higher courts. The Court of Appeals purported to pass on separate elements of the case, but did not consider the interrelation of the various elements and their aggregate effect in denying to the petitioners due process of law. It is the cumulative effect of all of the improper police conduct which is the heart of petitioners' case.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT SHOULD CONSIDER THE AGGREGATE EFFECT OF THE POLICE METHODS USED TO OBTAIN THESE CONVICTIONS OF MURDER.

Petitioners argued before the District Court that due process must be tested by taking a comprehensive view of the proceedings taken as a whole. (R. 25-27, 65, 390-417, 454-456) Specific arguments were also made on the effect of separate acts of police misconduct. But petitioners did not rely primarily on separate arguments, such as that advanced in *Wolf v. Colorado*, Nos. 17-18, O. T. 1948, that the specific provisions of the Bill of Rights are encompassed within the due process provision of the Fourteenth Amendment. Rather their main argument was pitched in terms of violation of the concept of due process, a concept which petitioners conceive to have significance and existence independent of and not limited by the specific prohibitions of the first eight amendments to the Federal Constitution. See *Adamson v. California*, 332 U. S. 46, 66, 67, 124 (1947); *Francis v. Resweber*, 329 U. S. 459, 468 (1947); *Malinski v. New York*, 324 U. S. 401, 414 (1945); *Twining v. New Jersey*, 211 U. S. 78, 99 (1908); *Hurtado v. California*, 110 U. S. 516, 535 (1884). The District Court nevertheless considered that its sole function was to make and preserve a record upon which higher Federal courts could pass. (R. 465-466)

In the Court of Appeals, in their Brief and Reply Brief, as well as in oral argument, petitioners again argued that upon the proceedings taken as a whole, due process of law was denied them. (Brief in Court of Appeals, pp. 29-34, Reply Brief in Court of Appeals, pp. 7-12.)

On the question of the use in a State trial of evidence illegally seized, the Court of Appeals conceived its func-

tion as that of following this Court rather than of anticipating its decision. And on petitioners' contention that the whole course of proceedings denied due process of law, the Court of Appeals progressed no further than the District Court. No ruling was made on the effect of all the improper acts of the Illinois police taken together.

Such a ruling was necessary to a decision on petitioners' claim of denial of due process. For "due process" is an over-all concept not confined to specific acts. Its meaning has been expressed variously by Justices of this Court.⁵ All such expressions resolve into the fundamental question: Was the process by which the accused were convicted consistent with our concepts of decency, fair play, and protection of individual rights? A general allegation of denial of due process, reduced to its essentials, raises this very question. Cf. *Musser v. Utah*, 333 U. S. 95, 96 (1948). Petitioners urge that apart from specific isolated acts of police misconduct, the whole course of the proceedings denied them due process of law.

In reviewing the essential fairness of State criminal trials, this Court has consistently regarded the totality of facts as controlling. The factual situation in *Betts v.*

⁵ See e.g., *Adamson v. California*, *supra*, at 61 (protection of ultimate decency in a civilized society"), 67 ("canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses"), 124 ("fundamental standards of procedure"); *Francis v. Resweber*, *supra*, at 468 ("civilized standards"); *Malinski v. New York*, *supra*, at 414 (civilized standards of law"); *Betts v. Brady*, 316 U. S. 455, 462 ("fundamental fairness * * * universal sense of justice"), 473 ("common and fundamental ideas of fairness and right") (1942); *Lisenba v. California*, 314 U. S. 219, 236 (1941) ("fundamental fairness essential to the very concept of justice"); *Palko v. Connecticut*, 302 U. S. 319, 325 (1937) ("the concept of ordered liberty").

Brady, as "tested by an appraisal of the totality of facts," 316 U. S. at 462, did not establish a denial of due process. But the test employed in that case has regularly been followed, not only in lack of counsel cases, but also where the total effect of police misconduct leading to a coerced confession has been under review. *Haley v. Ohio*, 332 U. S. 596 (1948); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Malinski v. New York*, 324 U. S. 401 (1945); *Chambers v. Florida*, 309 U. S. 227 (1940). The recurrent theme of police excesses shown by this record must be reviewed by the standards employed in those cases.

Where the real issue is whether the police methods used to obtain a conviction in a capital case are compatible with the concept of ordered liberty implicit in the Fourteenth Amendment, judgment can be fairly exercised only by a review of the whole course of the proceedings. This Court has rejected the contention that State criminal proceedings are to be judged alone with reference to the specifically enumerated commands of the Bill of Rights, *Adamson v. California*, 332 U. S. 46 (1947), and instead has adopted a test which is clearly stated by Mr. Justice Frankfurter in *Malinski v. New York*, 324 U. S. 401, 416-417 (1945):

"And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that *Malinski* by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived

him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

This approach to questions of due process necessarily requires the Court to test the fairness of the trial by considering all the facts in combination. For if each element of unfairness is not measured against a specific provision of the Bill of Rights on the theory that "due process" necessitates an over-all judgment, it must follow that such a judgment will view the picture painted by the prosecution in its entirety. The critic cannot be expected to appreciate the character of the portrait by first closing his eyes to the color of one illegal search after another, next ignoring the form of the arrest in Wisconsin, then shading the treatment of the key witness with presumptions of propriety, and finally not seeing that the whole picture is characterized by the breach of the agreement not to use the illegally seized evidence. This picture can be appreciated only by one who sees it as a composite whole, painted with a dominant and recurring theme of excesses by over-zealous police.* So viewed, these proceedings "in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law." *Malinski v. New York*, *supra*, at 418.

* See *Edwards v. Chile Copper Co.*, 270 U.S. 452, 455 (1926) ("* * * we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick.")

II.

THE AGGREGATE EFFECT OF THE POLICE EXCESSES DENIED PETITIONERS DUE PROCESS OF LAW.

The following elements of police misconduct—the illegal arrest and seizures in Wisconsin, the transportation to Illinois without extradition, the shocking series of illegal searches and seizures, the role of Davidson and his relation to the use of the illegally seized evidence both before and at the trial, and the complete disregard of the duty of police and prosecutor to the accused—foreclosed the possibility of fair proceedings in the conviction of petitioners.

ARREST IN WISCONSIN AND TRANSPORTATION TO ILLINOIS.

The arrest in Wisconsin, without process and beyond the jurisdiction of the Illinois officers, and the transportation of Rooney and Rizzo to Illinois, without extradition, are but one aspect of the total picture. (R. 52-53, 59, 314) An argument that such illegal arrest and extradition vitiate these convictions may be foreclosed by *Pettibone v. Nichols*, 203 U. S. 192 (1906). Nevertheless, Mr. Justice McKenna's dissent in that case expresses the importance of such action as one element to be considered:

“In the case at bar, the States, through their officers, are the offenders. They, by an illegal exertion of power, deprived the accused of a constitutional right. The distinction is important to be observed. It finds expression in *Mahon v. Justice*. But it does not need emphasizing. Kidnapping is a crime, pure and simple. It is difficult to accomplish; hazardous at every step. All of the officers of the law are supposed to be on guard against it. All of the officers of the law may be invoked against it. But how is it when the law becomes the kidnapper, when the officers of the law, using its forms and exerting its power become abductors? This is not a distinction

without a difference—another form of the crime of kidnapping, distinguished only from that committed by an individual by circumstances. If a State may say to one within her borders and upon whom her process is served, I will not inquire how you came here; I must execute my laws and remit you to proceedings against those who have wronged you, may she so plead against her own offenses? May she claim that by mere physical presence within her borders, an accused person is within her jurisdiction denuded of his constitutional rights, though he has been brought there by her violence?" 203 U.S. at 217-218.

This arrest and deliberate disregard of established extradition procedure set the tone for the police methods which, taken together, made orderly process and a fair trial of petitioners impossible. Illinois police accomplished by force a result which the State of Illinois, by proper executive action, could have requested, but not compelled. *Kentucky v. Dennison*, 24 How. 66, 107-110 (1861). A decent respect for the sovereignty of her sister State would have led Illinois to rely on the moral duty of the Governor of Wisconsin to deliver up persons charged with crime in Illinois. U.S. Const., Art. IV, Sec. 2, Cl. 2. If the arrest of one charged with a capital offense—be it kidnapping, murder, or even treason—has become an end justifying the means used in this case, "due process of law" and "presumption of innocence" are meaningless phrases which provide society and the individual with no real protection from the ever-growing dangers of a "too permeating police surveillance".

ILLEGAL SEARCHES AND SEIZURES.

Countries where police excesses are sanctioned by the State have come to be known, appropriately, as "police states". Although such states have grown in number, influence, and disastrous consequences, this Court has been

alert to the necessity of curbing police excesses in this country. Illegal searches and seizures of evidence for use in Federal prosecutions have been repeatedly condemned. When there is time for the police to secure an appropriate warrant, the most humble citizen has a right to have a judicial officer, rather than over-zealous police, decide whether, and to what extent, his privacy may be invaded by Federal agents. *McDonald v. United States*, 69 Sup. Ct. 191 (1948); *Trupiano v. United States*, 334 U.S. 699 (1948); *Johnson v. United States*, 333 U.S. 10 (1948).

The extent of the right to be free from comparable action by State police is as yet undetermined. *Wolf v. Colorado*, Nos. 17-18, O.T. 1948; *Lustig v. United States*, No. 1389, O.T. 1946. But that such a right exists cannot be doubted. The arguments made earlier this Term in *Wolf v. Colorado*, apply with even more force in this case. For the searches and seizures questioned in these petitions were both more numerous and more shocking than those in the *Wolf* case.

Whether *Wolf* is affirmed or reversed, these petitions for habeas corpus should be granted. The due process provision of the Fourteenth Amendment is sufficiently broad in its application to prevent the aggregation of police excesses shown by the record in these cases. The many illegal searches and seizures and their part in the interrelated pattern of police misconduct offend the notions of justice embodied in the Anglo-American tradition. The conscience of our free society, which must find expression in the decisions of this Court on issues such as are presented by the cases at bar, will not permit of compromise for the convenience of prosecutors.

Speedy conviction rather than a fair trial was the goal of the police. Officer Pribyl's matter-of-fact statement well illustrates this attitude of the police:

"We did not have a warrant when we went up to Wisconsin. We did not obtain any legal extradition papers of any kind. When we raided the Berwyn place we did not have a warrant. We did not have any search warrant. The owner of the building was in charge of the premises. There was nobody in charge of the flat. When we went to the union headquarters and seized the records, and raided it, we did not have warrant. We did not have any search warrant either time. We did not have a warrant or search warrant when we went out to the garage and seized the Plymouth. We went in through a window of the garage. We had the safe at the union drilled. We forced entrance into it." (R. 59-60)

The safe in Petitioner Rooney's office was drilled by police on May 26, 1933, three days after the murder, and two days after the office had first been searched. Papers and records were taken from the safe. No warrant had been issued for this action. (R. 46, 59-60) No evidence taken from the safe was introduced at the trial, and it is not known whether such papers and documents aided the prosecution in obtaining evidence which was introduced. Isolated from any other illegal action, it might be proper to presume that this larceny was harmless; but how isolate it from illegal act upon illegal act performed by the Illinois police?

The pattern of improper police conduct was reinforced a week later, in the night of June 2-3, 1933, when Rooney's apartment was broken into. Although the police had had 11 days to obtain a warrant, they acted without other authority than physical force. Again, police convenience prevailed over constitutional rights. A receipt for the

purchase price of field glasses was taken from a bureau drawer. (R. 47-49, 51, 54, 59) This search and seizure differs from the ransacking of the union office in that it is known that evidence illegally taken from Rooney's apartment was useful to the prosecution. The receipt for field glasses was introduced in evidence, over petitioners' objection, and in violation of the agreement of the prosecution not to use it. (R. 58-59, 378-379. See *People v. Rooney*, 355 Ill. 613, 623-624 (1934); *United States ex rel. Rooney v. Ragen*, 158 F. 2d 346, 348 C.A. 7th 1946) The prosecution could have been led to violate its solemn agreement only because it felt that the evidence was essential to corroborate the testimony of its unreliable key witness. (R. 359)

The police further demonstrated callous disregard for time-honored procedure by breaking into the home of Miss Rizzo's parents in the early hours of June 3, 1933. Twelve days after the shooting and again acting without a warrant, Miss Rizzo's automobile was taken from the garage at her parent's home. (R. 49-50, 59) The use of this car fits nicely into the ugly pattern. The witness McDowell told police that he saw a maroon Pontiac near the scene of the shooting. However, when the State's Attorney reenacted the crime in the presence of his witnesses on a bright summer afternoon, McDowell's recollection was so refreshed that he remembered that the car he had seen was not a maroon Pontiac but a blue Plymouth, just like Miss Rizzo's. (R. 55-59, 316-322, 327) Petitioners have the same right to object to the use of the Rizzo car in the reenactment of the crime as they would have had if the car had been introduced in evidence. *Silverthorne Lumber Co. v. United States*, 251 U.S. 391-392 (1920); cf. *Nardone v. United States*, 308 U.S. 338, 340-341 (1939).

The search and seizure at Eagle River, Wisconsin in the early hours of June 13, 1933 was doubly illegal. Not only was there no warrant, but Illinois officers acted far beyond their jurisdiction. Armed entry into Wisconsin and an invasion of the privacy of petitioner Rooney's cabin in the dead of night continued the wilful flouting of all standards of proper police conduct. Physical force and an illegal arrest were authority for this action. (R. 52-53, 59, 314) Field glasses were taken from the bureau drawer in the cabin at Eagle River, Wisconsin. (R. 53-54)

Upon petitioners' motion to suppress the illegally seized evidence, the State's Attorney agreed that it had been illegally seized and agreed further that it would not be introduced in evidence. The agreement was broken as readily as the illegal seizures had been perpetrated. (R. 53-54, 58-59, 378-379)

DAVIDSON

The treatment of the witness Davidson affords the finishing touch to this sordid picture. Shortly after the shooting, Davidson was taken into "protective custody", where he remained until after the trial when he was no longer useful to the prosecution. (R. 358) His depraved character, the history of his difficulty with the police, and the contrast between his own way of life and that provided him by the State's Attorney, made him peculiarly susceptible to the pressures of the State's Attorney. There is no way of determining whether he was influenced more by fear of implication in the murder or by the substantial payments and extraordinary hospitality of the State's Attorney. That he was influenced can hardly be doubted. Davidson's character was well known to the prosecution. (R. 234-235, 358-359, 377) Later described by the District Court as a "habitual liar", (R.

464) he was a man who would give whatever testimony seemed expedient at the moment. This is made clear in his willingness to recant his trial testimony, (R. 109-116, 261-264, 302-303) and later to recant his recantation. (R. 283-289, 291-292)

In the light of Davidson's malleable character and his importance to the prosecution, the omission of his name from the list of witnesses on the indictment and his inaccessibility to the defense in advance of the trial are easily understood. (Exhibit attached to motions to dismiss.)

The payments by the State's Attorney before, during, and after the trial, the support money paid to his wife, the loans which were never repaid, the apartment rent, the job on the city payroll, the hospitality and entertainment at the Palmer House and the Clayton Hotel may not establish conclusively either perjury or knowing use thereof. The Court of Appeals found neither. Perjury or no, the facts recited in an effort to prove perjury finally and irrevocably characterize the misconduct of the prosecution which led to the conviction of petitioners.

DUTY OF POLICE.

A final element of unfairness is derived from all of the misconduct of the police and the State's Attorney and should in turn be added to it in determining that petitioners were denied due process of law. Police are charged with the duty of prosecuting suspected criminals according to the traditions and laws of the land; included in this duty is the protection of and respect for the fundamental rights of the accused. *People v. Bimbo*, 314 Ill. 449, 454 (1924). This duty was ignored or deliberately violated throughout the proceedings. The best that can be said for such conduct is that the police misconceived their duty to be the obtaining of a conviction at all cost.

CONCLUSION.

These petitions should be granted and the convictions set aside. Apprehended and convicted of murder as a result of a series of excesses of police and prosecution more shocking than the heinous crime itself, petitioners were denied access to the courts by a combination of the Illinois procedural morass and an improper rule of the Warden of the State Penitentiary. When access to courts was finally afforded them, a series of efforts in the courts of Illinois produced not a single hearing of the merits of petitioners' case. An attempt to get such a hearing in the District Court was temporarily frustrated by a motion to dismiss these petitions. Even after a hearing on the merits the District Court refused to do more than make a record. The Court of Appeals in its turn ruled only on a portion of petitioners' case. Before this Court it is urged, as it was before the District Court and the Court of Appeals, that the cumulative effect of the several elements of police misconduct denied to petitioners the fair trial guaranteed them by the Constitution of the United States.

In this case, not only are the rights and freedom of two individuals in issue; society's interest in individual freedom is at stake. If the natural enthusiasm of the prosecutor is not constantly checked, the malignant growth of police excesses, once begun, will destroy a primary source of our continuing freedom. Only too late have other parts of the world learned that free society is endangered more by uncontrolled police excesses than by more familiar crimes.

Respectfully submitted,

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